IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-

JOHN MARTIN CONNOR ..... *Petitioner*

vs.

TERRELL DON HUTTO ..... *Respondent*

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Eighth Circuit Court of Appeals in *Connor* v. *Hutto*, appears at 516 F. 2d 853, and is attached in the Appendix to petitioner's brief.

JURISDICTION

Respondent accepts petitioner's jurisdictional statement as accurate.

QUESTIONS PRESENTED

I. The dismissal of a direct state criminal appeal by the United States Supreme Court for want of a substantial federal question is an actual adjudication for purposes of 28 U.S.C. §

2244 (c) and precludes subsequent federal habeas corpus.

II. The dismissal of a direct state criminal appeal by the United States Supreme Court for want of a substantial federal question constitutes a finding of insubstantiality that is binding on lower federal courts for purposes of consideration by a three judge panel pursuant to 28 U.S.C. § 2281.

STATUES AND CONSTITUTIONAL PROVISIONS INVOLVED

28 U.S.C. § 2244 (c) and 28 U.S.C. § 2281:

STATEMENT

Respondent accepts petitioner's statement of the case.

ARGUMENT

I

THE DISMISSAL OF A DIRECT STATE CRIMINAL APPEAL BY THE UNITED STATES SUPREME COURT FOR WANT OF A SUBSTANTIAL FEDERAL QUESTION IS AN ACTUAL ADJUDICATION FOR PURPOSES OF 28 U.S.C. § 2244 (c) AND PRECLUDES SUBSEQUENT FEDERAL HABEAS CORPUS.

Petitioner's state conviction was appealed to the United States Supreme Court and affirmed for want of a substantial federal question. *Connors* v. *State of Arkansas*, — U.S. —, 94 S.Ct. 884 (1973). The Federal District Court in which this

habeas action was brought considered that decision binding and Connors appealed to the Eighth Circuit seeking reversal of that order. The Eighth Circuit affirmed the district court at 516 F. 2d 853 (8th Cir. 1975); the decision appears at the appendix of petitioner's brief.

The effect of dismissing an appeal for want of a substantial federal question is determined by 28 U.S.C. § 2244 (c),

> ". . . A prior judgment of the Supreme Court of the United States on appeal or review by writ of certiorari at the instance of the prisoner of the decision of such state court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a federal right which constitutes grounds for discharge in a habeas corpus proceeding, actually adjudicated therein. . ."

Petitioner asks this court to determine whether the summary dismissal of a direct appeal for want of a substantial federal question is a final determination, such that the same issue may not be relitigated in a habeas corpus proceeding in the district court. Is a summary dismissal for want of a substantial federal question a decision on the merits such that the issue raised is "actually adjudicated therein".

As petitioner points out the court's that have addressed the problem assume that such a dismissal, as in the present case, is a dismissal on the merits.

> "Until the Supreme Court explicitly tells us otherwise, the lower courts must assume that the obligatory jurisdiction, a matter given to congress to con-

trol is being exercised in accordance with what appears to be the literal statutory mandate." ***U.S. Ex Rel Epton*** v. ***Nenna,*** 318 F. Supp. 899 n.8 (1970), affirmed, 446 F. 2d 363 (2nd Cir. 1971).

Simply because an opinion is not written, therefore rendering the decision of no analytical value as precedent, does not prevent the decision from being a final adjudication. The district in ***Epton*** v. ***Nenna,*** supra, properly considered such a dismissal as final until the United States Supreme Court indicates otherwise. One scholar has concluded—

> "There in little in theory and little in practice to suggest that summary affirmance, reversals, and dismissal for insubstantiality have ceased being decisions on the merits." Guther, The Subtle Vices of the "Passive Virtues", 60 Col. L. Rev. 1, 11 (1964).

Another legal writer has also touched upon the issue herein—

> "It must be assumed that the justices spend more time in studying jurisdictional statements on appeal than they do in studying petitions for writ of certiorari, engaged as they are in ***adjudicating*** rather than in exercising a statutory discretion whether to adjudicate." Hart, The Time Chart of the Justices, 73 Harv. L. Rev. 84, 89 (1959). (emphasis added).

Given the statutory mandate at 28 U.S.C. § 2244 supra, the Eighth Circuit and Second Circuit were correct in determining that the dismissal for want of a substantial federal question is a decision on the merits preventing further habeas consideration.

II

THE DISMISSAL OF A DIRECT STATE CRIMINAL APPEAL BY THE UNITED STATES SUPREME COURT FOR WANT OF A SUBSTANTIAL FEDERAL QUESTION CONSTITUTES A FINDING OF INSUBSTANTIALITY THAT IS BINDING ON LOWER FEDERAL COURTS FOR PURPOSES OF CONSIDERATION BY A THREE JUDGE PANEL PURSUANT TO 28 U.S.C. § 2281.

In *Goosby* v. *Osser*, 409 U.S. 512, 518 (1973), the United States Supreme Court recently held that—

> "In the context of the effect of prior decisions upon the substantiality of constitutional claims, those words import that claims are constitutionally insubstantial only if the prior decisions inescapably render the claims frivolous; previous decisions that merely render claims of doubtful or questionable merit do not render them insubstantial for the purposes of 28 U.S.C. § 2281."

The instant case has been previously dismissed by the United States Supreme Court for insubstantiality in such a manner as to "inescapably render the claims frivolous", not simply of "doubtful or questionable merit".

Petitioner contends that substantiality under 28 U.S.C. § 2281 for purposes of convening a three judge panel is somehow different than substantiality for purposes of direct appeal to the United States Supreme Court. In *Heaney* v. *Allen*, 425 F. 2d 869 (2nd Cir. 1970) that court held that a question branded insubstantial on direct appeal to the United States Supreme

Court remains so except when doctrinaire developments indicate otherwise. As analyzed in the Eighth Circuit's opinion in the instant case, such doctrinaire developments have not appeared.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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